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In The

Supreme Court of the United States

October Term, 1951

No. 240

Daniel Partridge, III, Executor of the Estate of Grace S. Partridge,
Petitioner

v.

Hanserd K. Presley, Executor of the Estate of Helen Draper Hoffman,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX AND TABLE OF CASES AND STATUTES

PAGE

Statement of Reporting of Opinions Below 1

Jurisdictional Statement 2

Statement of Questions Presented 2

Statutes Involved 5

Statement of the Case 5

Reasons for Granting the Writ 12

To Decrease Useless Litigation 12

The Summary Judgment Rule 12

One Fair Trial of a Separable Issue 15

Complete Appellate Opinions 17

To Check the Trend Away From the Enforcement of Contracts at a Proper Point 17

Conclusion 21

Cases

Abrahams v. King, 111 Md. 104, 73 A. 694 4

American Insurance Co. v. Brady Storage Co., 101 F. (2d) 144 16

Baker v. Smith & Gottlieb, Inc., 132 F. (2d) 18, 76 U. S. App. D. C. 403 15

Bowles v. Ward, 65 F. Supp. 880 14

Cain v. Warford, 33 Md. 23 15

Caldwell v. Modern Woodmen of America, 133 P. 843 16

Castleman v. Avignone, 56 App. D. C. 253 8

Chicago & A. R. Co. v. Allen, 249 F. 280 16

Chi. R. I. & P. Ry. Co. v. Stephens, 218 F. 535 16

Colburn v. Ellers, 160 Md. 104, 153 A. 14 15

Critchfield v. Easterday, 26 App. D. C. 89 15

Cross v. Passumpsic Fibre Leather Co., 90 Vt. 397, 98 A. 1010 16

Dertrick v. Greaney, 309 U. S. 190, 84 L. ed. 694, reh. den. 309 U. S. 697 18

Dustin Grain Co. v. McAllister, 296 F. 611 18

Ecker, et al. v. Potts, et al., 72 App. D. C. 174, 112 F. (2d) 581 16

PAGE

Embry v. Lewis, (Tex. Civ. App.) 19 S. W. (2d) 87 18
Empire Fuel Co. v. Lyons, 257 F. 890, cert. den. 252 U. S. 582 16
Fidelity & Guaranty Co. v. Bilquest, 108 F. (2d) 713 15
Fox v. Johnson and Wimsatt, 75 U. S. App. D. C. 211, 127 F. (2d) 729 4
Gaines v. Caldwell, 148 U. S. 228, 230, 232, 238, 240, 13 S. Ct. 611 16
Ganent Biblical Institute v. American University, 82 U. S. App. D. C. 265, 163 F. (2d) 265 14
Goode v. Gaines, 145 U. S. 141, 154, 155, 36 L. ed. 654 16
Griffin v. Boston & Maine R. R., 87 Vt. 278, 89 A. 220, 228 16
Griffin v. Griffin, 327 U. S. 220, 90 L. ed. 635, 638, 639 & 644 14
Hannan v. United States, 76 U. S. App. D. C. 118, 131 F. (2d) 441 20
Haley v. Calef, 28 R. I. 332, 67 A. 323 ..... 1[illegible]
Hoffman v. Partridge, 84 U. S. App. D. C. 224, 172 F. (2d) 275 .....
Hoyt v. Upper Marion Ditch Co., 76 P. (2d) 234, 94 Utah 134 .....
Insurance Co. v. Mowry, 96 U. S. 544, 24 L. ed. 674 ..... [illegible]
Jones Store v. Dean, 56 F. (2d) 110, cert. den. 286 U. S. 559, 76 L ed. 1292 ..... [illegible]
Jouan v. Divoll, 154 U. S. 657, 38 L. ed. 1092 .....
Kansas City, etc. Co. v. Haake, 331 Mo. 429, 438, 53 S. W. (2d) 891, 84 A. L. R. 1477 9
Keyser v. Hitz, 133 U. S. 138, 33 L. ed. 531, 537 5
Koops v. Gregg, et al., 32 A. (2d) 653 16
Korth Collector of Internal Revenue v. Zion Trust Co., 148 F. (2d) 170 20
Lambour v. Cleveland Trust, 29 F. (2d) 46 18
Latta v. Granger, 167 U. S. 81, 83-86, 17 S. Ct. 746, 42 L. ed. 85 16
Lewis v. American Security & Trust Co., 53 App. D. C. 258 15
Lisbon v. Lyman, 49 N. H. 553, 583, 600-602 15
Ludlow v. Free, 55 N. E. (2d) 318, 222 Ind. 568 18
Machovec v. Shipley, 189 A. 223, 117 Md. 339 18
May Department Stores v. Bell, 61 F. (2d) 830 16
McCarthy v. Wynne, 126 F. (2d) 620 7

TORN

PAGE

Mead v. Gilbert, 170 Md. 592, 596-603, 185 A. 668 15
Milton v. United States, 71 App. D. C. 394, 398, 110 F. (2d) 556, 560 19
Naftzger, et al., v. State, 24 Ohio App. 183, 156 N. E. 614 20
N. E. D. Holding Co. v. McKinley, 246 N. Y. 40, 157 N. E. 923 4
N. L. R. B. v. Montgomery Ward & Co., 79 U. S. App. D. C. 200, 144 F. (2d) 528 14
Ocean Corp. v. Penick & Ford, 101 F. (2d) 493 16
Paine v. Parkhurst, 205 F. 740, 744 18
Park v. Compton, 55 F. (2d) 80, 82 19
Parker Wash. Co. v. Cramer, 201 F. 878 16
Pendergast v. Reed, 29 Md. 398, 96 Am. Dec. 539 20
Pen-Ken v. Warfield, 137 F. (2d) 871 14
Pennsylvania, etc., Ins. Co. v. Nussenger, 29 A. (2d) 653 20
Piantadosi v. Loews, Inc., 137 F. (2d) 534 14
Reynolds v. Reynolds, 15 Conn. 83 16
[illegible]ett Lumber Co. v. Linder, 217 N. W. 946, 116 Nev. [illegible]3 17
[illegible]oins v. Townsend, 37 Mass. (20 Pick.) 345 16
[illegible]n v. H. O. L. C., 151 F. (2d) 541 14
[illegible]ffler v. Bowles, 153 F. (2d) 1 14
[illegible]artz v. Westbrook, 81 U. S. App. D. C. 64, 154 F. [illegible]) 854 8
[illegible]hern Ice Co. v. Morris, 219 F. 551 18
Spear v. City of Bath, 130 A. 507, 125 Me. 27, 30 19
Starr v. Holck, et al., 318 Mich. 452, 28 N. W. 289 4
Stem v. Ace Wrecking Co., (D. C. Mun. Ct. of App., 1944), 38 A (2d) 626, 627 18
U. S. v. Certain Parcels of Land, 144 F. (2d) 626 20
United States v. Lambert, 146 F. (2d) 469, 471 19
United States v. Thompson, 146 F. (2d) 473, 475 19
Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203, 205 15
Webster Co. v. Trinidad Co., 92 F. (2d) 177 15
West Skokie Drainage Dist. v. Dawson, 243 Ill. 175, 181, 90 N. E. 377 19
Wigmore on Evidence 19
Williston on Contracts 18
Wit[illegible]n v. Giacalone, 81 U. S. App. D. C. 20, 154 F. [illegible]) 20 14

PAGE

Wolff Packing Co. v. Court of Industrial Relations, 267 U. S. 552, 69 L. ed. 785 16
Yellow Cab Co. v. Keane, 93 F. (2d) 290 16

Statutes and Rules

Federal Rules of Civil Procedure 5
United States Code, T. 28, § 1254 (1) 2

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No.

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Petitioner

v.

Hanserd K. Presley, Executor of the Estate of Helen Draper Hoffman,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Daniel Partridge, III, Executor of the Estate of Grace S. Partridge, petitioner, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled cause on January 19, 1949, and April 5, 1951.

OPINIONS BELOW

The opinion on the first appeal (R 164) is reported sub nom. *Hoffman* v. *Partridge* in 84 U. S. App. D. C. 224, 172 F. 2d 275. The opinions on the second appeal (R 170) are as yet unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on April 5, 1951 (R 179). Petition for rehearing was denied by order of May 15, 1951 (R 191). The first judgment reversed a District Court judgment granting a motion by plaintiff for summary judgment as to liability and remanded the cause for further proceedings. The second judgment affirmed a District Court judgment granting a motion for judgment made at the end of plaintiff's case as to liability.* Consequently, the first judgment of the Court of Appeals also is in question here. The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1254 (1).

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in reversing the District Court's grant of plaintiff's motion for summary judgment as to liability under F. R. C. P. 56, when specific facts showing liability:—

(a) Were undenied; or denied only by conclusions, or a defense suggested but not fully stated factually.

(b) Were denied only in a verified answer which did not show affirmatively that the defendant was competent to testify as required by sec. (e) of rule 56.

II. Whether the burden of proof is so heavily on a movant for summary judgment that an allegation in a verified answer which falls short of stating a defense, but suggests that there might be one, justified the Court of Appeals in reversing the District Court's order granting the motion, passed after several amendments of the

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* The equivalent of a directed verdict as to liability.

answer of the party opposing summary judgment and ample time to that party to fully state a defense?

III. If the Court of Appeals were correct in deciding that the District Court erred in granting summary judgment as to liability alone, did it err in reversing the final judgment of the District Court rendered after a separate hearing before a different judge and a finding by that judge fixing the amount of damages, or should the remand have been limited to the question of liability alone,[1] i. e., should an appellate court direct the retrial of a separable issue where it found no error in the trial of that issue?

IV. Where the contract for the sale of real estate also contained an agreement by the seller-defendant to deliver "her permit" to make the house into a two-family dwelling, should the Court of Appeals have held that the contract was unenforceable because the house was in a territory restricted by zoning regulations to one-family dwellings,[2] i. e., should contracting parties be allowed to avoid their contracts on the grounds that one of the agreements in the contract is to do something known by them to be impossible of performance where this impossibility is unknown to the other contracting party?

V. Should conduct of the seller in commencing alterations of a single family house into a two family dwelling and her representations both in the contract and orally

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[1] In this connection the District Court erred in construing the mandate on the first appeal to require a retrial of the issue of damages, or the Court of Appeals erred in its first opinion and judgment in not clearly indicating that said issue was not to be retried.

[2] Actually there was no pleading or competent evidence of the existence of such a regulation, nor is there any evidence whatsoever to the effect that Mrs. Hoffman did not have the permit she agreed to deliver.

(to a third person, but repeated to the purchaser[3]) to the effect that she had such a permit estop her from claiming such impossibility of performance?

VI. Should the Court of Appeals have decided the impossibility point in the first appeal in order to decrease litigation?

VII. Should the District Court's valuation of the real estate involved here be held for naught because there had been a previous auction sale of most of the property contracted for, for less than the contract price and a sale at about the contract price, contracted for the day after the contract sued upon and consummated some three days thereafter,[4] i. e., are sales of real estate conclusive evidence of value regardless of other circumstances?[5]

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[3] The District Court erred at the second hearing in excluding this evidence and the Court of Appeals erred in not so holding. This evidence was admitted at the first hearing. The majority of the Court of Appeals erroneously referred to it as "of doubtful admissibility" and refrained from saying that the third person told Mrs. Partridge of the representation. They erred in failing to give any significance to this testimony.

[4] The Court of Appeals erred in this connection:—
(a) in holding that there was no evidence of damage and
(b) in holding that the District Court's finding was clearly erroneous.

[5] The District Court erred in holding as it did at the hearing after the first appeal that the contract was void for lack of mutuality and lacked a material element, i. e., the time for performance. However, since J. Miller's opinion of April 5, 1951, did not support this holding and Ch. J. Stephens' opinion was that it was erroneous, it is considered that the opinion of the Court of Appeals is that this holding was error. Besides the construction of Ch. J. Stephens (R. 175) the law supplied a reasonable time in the blank left for time for performance: *Fox* v. *Johnson and Wimsatt*, 127 F. (2d) 729, 735, 75 U. S. App. D. C. 211, 217; *Abrahams* v. *King*, 73 A. 694, 111 Md. 104, 109; *N. E. D. Holding Co., Inc.* v. *McKinley*, 157 N. E. 923, 246 N. Y. 40; *Starr* v. *Holck, et al.*, 318 Mich. 452, 28 N. W. 289. The majority erred in stating that at the second trial Mrs. Partridge made no effort whatever to prove damage (R. 173). See Ch. J. Stephens' dissent in this regard (R. 177) and R. 178).

STATUTES INVOLVED

Excerpts from Federal Rules of Civil Procedure. Summary Judgment Rule 56:—

"(a) *For Claimant.* A party seeking to recover upon a claim, * * * may, * * * move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

"(c) * * * The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[6]

"(e) *Form of Affidavits; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. * * *"

New Trials. Rule 59:—

"(a) Grounds. A new trial may be granted * * * on all or part of the issues * * *."

STATEMENT OF THE CASE

Petitioner is the executor of the estate of Grace S. Partridge (hereinafter called Mrs. Partridge). Respondent is the executor of the estate of Helen Draper Hoffman (hereinafter called Mrs. Hoffman). Petitioner and respondent were duly substituted for their respective decedents after their deaths pending this litigation. Mrs.

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[6] Amendment approved December 27, 1946, struck the words "except as to the amount of damages" and added: "A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

Partridge, plaintiff below, on June 3, 1946, filed a complaint in the United States District Court for the District of Columbia to recover damages from Mrs. Hoffman, defendant below, for breach of a contract of sale of real and personal property dated May 19, 1946 (R 1). Plaintiff's motion for a summary judgment as to liability was granted April 17, 1947, and the case was set down for hearing as to the amount of damages suffered by plaintiff by reason of defendant's breach of the contract (R 141). After considerable testimony as to the amount of damages before another Judge (R 26-104) he found by written memorandum of December 2, 1947, that the damages suffered were in the amount of $15,200.00 (R 105). December 11, 1947, final judgment was granted to plaintiff in this amount (R 105). Defendant appealed from this judgment and the Court of Appeals decided that the summary judgment as to liability was erroneously granted and that it was not then necessary to decide whether or not there was error in the fixing of damages. The final judgment of December 11, 1947, was then reversed and the cause remanded for further proceedings not inconsistent with the opinion (R 108A). The District Court, without setting aside the finding as to the amount of damages, ordered that both the liability issue and the damage issue should be retried (R 110A). At the end of plaintiff's testimony as to liability at the retrial, a motion for judgment by defendant was granted (R 158A) and plaintiff appealed from the final judgment (R 120A). In the second appeal before three judges, the majority were for the defendant-appellee (R 170) with a dissent by the Chief Judge (R 174).

A copy of the contract of sale was attached to the complaint (R 3-8). In it Mrs. Hoffman agreed to sell real estate known as 8 Lenox Street, Chevy Chase, Maryland, together with all furniture and fixtures then in the house, for a purchase price of $32,300.00, payable $3,300.00 cash,

approximately $17,000.00 by the assumption of a first trust, and the balance of approximately $12,000.00 by Mrs. Partridge's note bearing 5 per cent interest, payable $75.00 per month until paid. The first sentence of paragraph 13 is as follows:—

> "Within . . . days from the date of acceptance hereof by the seller, or as soon thereafter as a report on the title can be secured if promptly ordered, and/or survey, if required, the seller and purchaser are required and agree to make full settlement in accordance with the terms hereof."

Paragraph 15 provides that if the property is located outside of the District of Columbia, the name of the jurisdiction in which it is located is substituted automatically wherever any reference is made to said District. After the last numbered paragraph 17 is the following:—

> "* * * The seller agrees to deliver her permit from the D. C. for the installation of an additional kitchen in the house, making it a two-family dwelling. * * *"

The complaint alleged that defendant refused to carry out her contract of May 19, 1946, with plaintiff and made a second contract to sell the real estate and conveyed it to another person by deed dated May 23, 1946, and recorded May 29, 1946 (par. 4, R 2). Defendant filed an answer (R 8) and an amended answer (R 16), and the District Court was of the opinion that it did not state a defense, but granted leave to file a second amended answer and continued the motion to allow her to do so (R 17 & 18). The second amended answer filed December 9, 1946, was verified and alleged in part that in May of 1946 plaintiff called at the home of defendant when she was ill and in bed with an illness that "was such that she was unable to think *clearly* or understand *fully* the discussions she then had with the plaintiff" (Emphasis supplied); that plaintiff then represented to the defendant that plaintiff was a real estate broker and desired a listing of No. 8 Lenox

Street, Chevy Chase, Maryland, or an option; that defendant believed that the instrument she then executed, but was unable to read or understand because of her physical condition, was a listing or an option; that she never intended to sell the property on the terms set forth in the contract dated May 19th; that said contract is void because it requires the delivery of a permit from the District of Columbia to alter the property into a two-family dwelling when the property is in Maryland and in an area *restricted by covenant*[7] to single-family dwellings, which plaintiff knew or should have known; and that defendant admitted that she subsequently sold the property to another (R 18 & 19).

Plaintiff then filed a supplemental affidavit dated December 17, 1946, in support of her motion for summary judgment, in which she set forth specifically and in detail the circumstances surrounding the execution of the contract. Mrs. Partridge prepared the contract on May 18, 1946. She then heard that Mrs. Hoffman was sick in bed and decided to wait until her son, an officer in the Navy, was there before presenting it to Mrs. Hoffman. About noon on May 19, Mrs. Partridge called at Mrs. Hoffman's home and saw her son (R 22). He said Mrs. Hoffman was well enough to see Mrs. Partridge and took her to a room where Mrs. Hoffman was sitting up in bed. Mrs. Partridge then delivered an explanatory letter, the contract and a check for the deposit, and both Mrs. Hoffman and her son read them. She then asked Mrs. Partridge a number of intelligent questions about the contract, including a question about the relation of the price she had put on the property to the contract price. Mrs. Hoffman then asked for time to think it over and Mrs. Partridge left, leaving the papers with them. In response to a telephone call Mrs. Partridge

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[7] Such a covenant might not be enforceable: *Castleman* v. *Avignone*, 56 App. D. C. 253, 258; and in any case would not be a defense to an action for damages: *Schwartz* v. *Westbrook*, 81 U. S. App. D. C. 64, 154 F. (2d) 854.

went back about four hours later and Mrs. Hoffman signed the contract and delivered one of the duplicates to plaintiff. Mrs. Hoffman thereafter asked that certain of her personal effects in the house be excluded from the sale and Mrs. Partridge agreed. During the entire time of both interviews Mrs. Hoffman's son was there. Nothing was said about any listing or option. Mrs. Partridge made no attempt to persuade Mrs. Hoffman to sign the contract; Mrs. Hoffman, although in bed, seemed to be in the possession of all her faculties and asked intelligent questions (R 21-24).

On April 17, 1947, the District Court granted the motion for summary judgment as to liability and ordered a hearing as to the amount of damages (R 104).

At the hearing on damages, Miss Manning, a friend of plaintiff and an acquaintance of defendant, testified that between March and May of 1946, witness went to see the house, to which improvements were then being made (R 27, 28); that among the improvements was the installation of a kitchen on the second floor in addition to one already on the first (R 28); that witness then went to see defendant and told her that she wasn't interested in purchasing the property personally but had a friend who was in the business and might be interested in it (R 28, 31); that witness then told defendant that witness had been told that rooms and roomers were not permitted in the section where the house was located and defendant in effect told witness that she (defendant) had a permit to remodel the house into apartments and "they would not give me a permit if they weren't allowed," (R 28); and that witness then called plaintiff and told her what defendant had said about the house and the permit (R 29). During this interview defendant put a price of $49,000. on the house (R 33). Two well-qualified experts on real estate values testified for plaintiff that the fair market value of the property was $47,500. and $46,500., respectively, if it could be used

as a two-family dwelling and $42,500. and $42,000., respectively, if it could not (R 54, 62). One of these witnesses also testified that the fair market value of the $12,000. second-trust note agreed to in the contract was $6,000. (R 66). Mrs. Partridge testified that at the interview with Mrs. Hoffman and her son only this one property was discussed (R 74); and that she had been buying furniture for about 15 years and the fair market value of the unattached furniture in the house was $350.00 or $400.00 (R 70). Two expert witnesses, Messrs. Leigh and Barkley, for defendant each testified that the fair market value of the property on June 1, 1946, was $34,000. (R. 84, 92). One testified that the zoning of the area was restricted to one-family dwellings and plaintiff made known to the court that there was objection to the testimony and considered it inadmissible (R 81). One testified that its fair market value if it were converted to a two-family dwelling was $14,000. to $20,000. and that the value of the lot was $15,000. (R 95, 101). Mr. Leigh was very much interested (R 84-89). Mr. Barkley was influenced by hearsay (R 96), he did not take rental value, investment value, nor reproduction cost into consideration, in valuing the property (R 97, 98); he considered the house a monstrosity (R 99) and the photographs showed otherwise (plaintiff's Exs. 2a, b, c, e, f, j & l), and he valued the land at a higher price than a valuation of the house and land as a two-family dwelling (Compare R 95 with R 101). A floor plan of the house and photographs of the house and lot were admitted in evidence. (Plaintiff's Exs. 1 & 2a, b, c, e, f, j & l, on file as originals.)

At the retrial, Miss Manning's testimony to the effect that Mrs. Hoffman had said she had a permit to reconvert was excluded (R 122A, 123A and 153A). Mrs. Partridge testified substantially in accordance with her supplemental affidavit in support of her motion for summary judgment and her testimony at the hearing on damages (R 122A, et seq.); also, that Mrs. Hoffman had told Mrs. Partridge

before the contract was signed that she, Mrs. Hoffman, was living in the house, converting it into apartments (R 123A), and Mrs. Partridge had thereafter gone to see the house and found that it was being converted into apartments (R 131A and 132A); that the ability to reconvert was an important element to her (R 125A); and that it did not occur to her that the property could not be converted (132A, 134A & 135A). The Court (erroneously, we contend) rejected testimony of Mrs. Partridge of conversations with Mrs. Hoffman and her son regarding the contract and its merits (R 148A-150A).

The sole point upon which the Court of Appeals reversed the case in the first opinion, of January 3, 1949, was that the amended answer created a genuine issue of incapacity to contract. The Court interpreted this pleading as being of the fair import that "as a result of her physical illness, Mrs. Hoffman was unable *fully* to understand the transaction and the import of the contract which she signed." (Emphasis ours) [8]

On the second appeal Judge Miller's opinion, for the majority of two out of three judges, upheld the District Court's dismissal, principally on the grounds that the contract was impossible of performance because the property was zoned against two-family dwellings (R 172); and that the District Court's award of damages was clearly erroneous as there was no showing of damage to Mrs. Partridge at either the first or second trial (R. 174). Chief Judge Stephens' opinion dissented from both these grounds (R 177, 178).

A petition for rehearing and a motion for leave to file a petition for rehearing in banc were both denied (R 180, 193).

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[8] The opinion also mentioned the allegation that Mrs. Hoffman did not know whether or not she signed the contract, but this allegation was in a prior amended answer (R. 16).

REASONS FOR GRANTING THE WRIT

To Decrease Useless Litigation

A major problem in our judicial system is the processing of the tremendous amount of litigation which is increasing far beyond the additions in population because of the growing complexities in our social and economic system. This case presents an opportunity to the Supreme Court to wisely exercise its powers of supervision over the Federal courts to eliminate much useless, time-consuming and expensive litigation:

A. By correcting erroneous applications of the summary judgment rule;

B. By enforcing the rule against more than one fair trial of a separable issue; and

C. By requiring opinions from the Appellate Courts in the first appeal on all issues before it in that appeal.

The Summary Judgment Rule

The controversy here revolves around the interpretation of "genuine issue of fact." After two unsuccessful attempts to state a defense, defendant, well represented by able counsel, filed her second amended answer to a clear and simple statement of a cause of action for breach of contract. This answer said plaintiff called at defendant's home when she was ill and in bed, when she was unable to think *clearly* or understand *fully* the discussions with plaintiff; that plaintiff said she desired an option or listing, defendant thought the contract which she was unable *then* to read and understand was such, and it never was her intention to sell the property upon the contract terms. Plaintiff then filed her supplemental affidavit in which she swore to specific facts to the effect that she had *two* interviews with defendant on the day the contract was signed; that defendant was sick and in bed, but in the full posses-

sion of her faculties and asked intelligent questions indicating she understood the transaction fully; that at the end of the first interview defendant asked for time to think it over and at her request plaintiff left the papers with her; that about four hours later, plaintiff returned for the second interview and defendant signed the contract and asked that her personal effects not be included in the sale; *and that defendant's son, Commander Hoffman, was there the entire time of both interviews.* Defendant then was given four months to produce an affidavit from her son or file one herself to rebut these specific allegations and when she failed to do either one summary judgment was entered. Under the circumstances, the second amended answer of defendant is defective to defeat summary judgment not only in failing to deny specific averments specifically, but also in failing to comply with rule 56 (e) requiring an affirmative showing that affiant is competent to testify.[9] The procedure followed here of allowing ample time and amendments to state defenses and ordering summary judgment if the facts alleged fall short of a defense is more constructive than that put into practice by the Court of Appeals decisions of the last 5 years. In such cases as this counsel can be relied upon to state defenses as strongly as they can without perjury and it is naive of the Courts to require trials. It would be more constructive, also, to give the District Courts more discretion in deciding whether or not a *genuine* issue of fact is presented, than has been given by our Court of Appeals. The District Court can better evaluate the sincerity of a questionable defense and the other circumstances which bear upon this somewhat intangible question.

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[9] Defendant here was on the horns of a dilemma. If she alleged the incapacity to contract, her affidavit would be incompetent and how would she explain the new contract the next day and the deed a few days later? However, if the allegations of Mrs. Partridge's affidavit had been untrue, defendant could easily have filed a rebutting affidavit by Commander Hoffman.

This case and *Wittlin* v. *Giacalone,*[10] 81 U. S. App. D. C. 20, 154 F. (2d) 20, *Ganet Biblical Institute* v. *American University,* 82 U. S. App. D. C. 265, 266, 163 F. (2d) 265, and other cases in the District of Columbia Circuit in the past 5 years have carried the idea of resolving doubts against the moving party past the point of being constructive, and thousands of cases that should be decided by summary judgment are going to trial in the District Courts where the word of the Court of Appeals is law. It should be remembered, in this connection, that an order denying a motion for summary judgment is not ordinarily appealable, while an order granting one is.

These cases are in conflict with *Piantadosi* v. *Loews, Inc.* (9th Cir., 1943), 137 F. (2d) 534, and *Schreffler* v. *Bowles* (10th Cir., 1946) 153 F. (2d) 1, holding that general allegations are insufficient to create a genuine issue of fact where the moving party has set forth the facts specifically and in detail;[11] and with *Pen-Ken* v. *Warfield* (6th Cir., 1946) 137 F. (2d) 871, 877, cert. den. 320 U. S. 800, 88 L. ed. 843, reh. den. 321 U. S. 803, 88 L. ed. 1089, holding that when a showing is made by the movant, the burden rests on the opposite party to show that he has a ground of defense fairly arguable and of a substantial character. This conflict regarding general allegations was expressly

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[10] Summary judgment for plaintiff was reversed in this case; a trial resulted in judgment for plaintiff affirmed by the Court of Appeals, *Wittlin* v. *Giacalone,* 84 U. S. App. D. C. 140, 171 F. (2d) 147.

[11] And see:
Griffin v. *Griffin,* 327 U. S. 220, 90 L. ed. 635, 638, 639 & 644;
Sabin v. *H. O. L. C.* (10th Cir., 1945) 151 F. (2d) 541;
N. L. R. B. v. *Montgomery Ward & Co.,* 79 U. S. App. D. C. 200, 144 F. (2d) 528;
Bowles v. *Ward* (Dist. Ct. Pa., 1946) 65 F. Supp. 880. (On such motion the parties litigant must fully disclose all evidence which sheds any light in explanation of the allegations in the pleadings.)

recognized by the District of Columbia Circuit in the Ganet case, supra, at 82 U. S. App. D. C. p. 267.[12]

The allegations that defendant did not read and did not understand and did not intend, did not state a defense.[13] She could be physically incapacitated and still have capacity to contract [14] and did, according to the detailed allegations of plaintiff.[15]

One Fair Trial of a Separable Issue

Early in the judicial history of our country our Courts recognized the artificiality and injustice of the early common law rule that forbade the splitting of a cause of action no matter how numerous or separable the issues: *Lisbon* v. *Lyman*, 49 N. H. 553, 583, 600-602.

Many appellate decisions have affirmed the conclusion that a new trial after appeal should be confined to the

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[12] "While the statement of a mere legal conclusion will not suffice to raise an issue, we think that a general denial of an allegation of fact is sufficient to raise an issue and that this is so elementary that we decline to follow authority to the contrary in other jurisdictions." (Citing, as such authority, the Piantadosi and the Schreffler cases, inter alia.)

[13] *Keyser* v. *Hitz*, 133 U. S. 138, 33 L. ed. 531, 537; *Upton* v. *Tribilcock*, 91 U. S. 45, 23 L. ed. 203, 205; *Webster Co.* v. *Trinidad Co.* (CCA 4th., 1938) 92 F. (2d) 177; *Fidelity & Guaranty Co.* v. *Bilquest* (10th Cir., 1940) 108 F. (2d) 713.

[14] *Mead* v. *Gilbert*, 170 Md. 592, 596-603, 185 A. 668; *Colburn* v. *Ellers*, 160 Md. 104, 153 A. 14; *Cain* v. *Warford* (Md., 1870) 33 Md. 23, (The contract in the instant case was to sell Maryland real estate); cf. 1 A. L. I. Restatement, Contracts, p. 21, sec. 18 (b); and see: *Lewis* v. *American Security & Trust Co.*, 53 App. D. C. 258, 289 F. 916; *Critchfield* v. *Easterday*, 26 App. D. C. 89.

[15] The allegation that the agreement was to deliver a D. C. permit when the property was in Maryland was not only ineffective as a defense because of par. 15 of the contract (R 6 & 7), but because they were dealing only with one property and mutually understood the agreement to be applicable to that property: *Baker* v. *Smith & Gottlieb, Inc.*, 132 F. (2d) 18, 76 U. S. App. D. C. 403.

issues in which error occurred [16], so cogently sustained by the reasoning in the *Lisbon* case, infra. The Federal Rules of Civil Procedure support this rule.[17]

A study of the trilogy of Supreme Court Decisions, *Latta* v. *Granger,* 167 U. S. 81, 83-86, 17 S. Ct. 746, 42 L. ed. 85, *Gaines* v. *Caldwell,* 148 U. S. 228, 230, 232, 238, 240, 13 S. Ct. 611, 37 L. ed. 432, and *Goode* v. *Gaines,* 145 U. S. 141, 154, 155, 36 L. ed. 654, reveals that this Court has decided that a reversal and remand requires the retrial of only those issues in the trial of which the opinion found error;[18] and that said trilogy are directly in point in plaintiff's favor on the question of the construction of the mandate

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[16] *Ocean Corp.* v. *Penick & Ford,* 101 F. (2d) 493; *American Ins. Co.* v. *Brady Storage Co.,* 101 F. (2d) 144; *Yellow Cab Co.* v. *Keane,* (C. C. A. 7-1937) 93 F. (2d) 290; *May Department Stores* v. *Bell,* (C. C. A. Mo., 1932) 61 F. (2d) 830; *Empire Fuel Co.* v. *Lyons,* (C. C. A. Ohio 1919) 257 F. 890, cer. den. 252 U. S. 582, 64 L. ed. 727; *Chicago & A. R. Co.* v. *Allen,* 249 F. 280, granting new trial on jurisdictional question alone; *Parker Wash. Co.* v. *Cramer,* (C. C. A. 7, 1912) 201 Fed. 878 and *Ch. R. I. & P. Ry. Co.* v. *Stephens,* 218 F. 535, where the Court held that an insufficient averment of diversity of citizenship in the declaration should not affect the trial on the merits unless there was in fact no diversity of citizenship, and reversed the judgment with directions to the trial court to permit an amendment and trial on this issue and dismiss the action if it be found that diversity did not exist, but otherwise to enter judgment on the verdict; *Hoyt* v. *Upper Marion Ditch Co.,* 76 P. (2d) 234, 94 Utah 134, retrial should be had on issue of necessary party alone; *Griffin* v. *Boston & Maine R. R.,* 87 Vt. 278, 89 A. 220, 228, new trial should be on issue of liability alone where error affected liability and not damages; *Cross* v. *Passumpsic Fibre Leather Co.,* 90 Vt. 397, 98 A. 1010, same holding as above case; *Robbins* v. *Townsend,* 37 Mass. (20 Pick.) 345, same; *Caldwell* v. *Modern Woodmen of America,* 133 P. 843, same; *Haley* v. *Calef,* 28 R. I. 332, 67 A. 323, same; *Reynolds* v. *Reynolds,* 15 Conn. 83, same; *Koops* v. *Gregg, et al.,* 32 A. (2d) 653, same.

[17] Rules 56 and 59 (a); See: *Ecker, et al.,* v. *Potts, et al.,* 72 App. D. C. 174, 112 F. (2d) 581.

[18] And see: *Wolff Packing Co.* v. *Court of Industrial Relations,* 267 U. S. 552, 69 L. ed. 785.

in the instant case.[19] Yet the District Court and the Court of Appeals and many of the other District and Circuit Courts have failed to follow the Supreme Court, and failed to follow this common sense rule that saves so much time and expense and avoids so much useless litigation.

Complete Appellate Opinions

Of late years the reaction against the long opinions of the early days has gone so far that many Appellate Courts have failed to make any decision on some of the issues before them.[20] Where there is a remand for further proceedings this frequently results in avoidable additional appeals in the same case. This also results in miscarriages of justice in cases where the party's financial or emotional capacity to litigate beyond the District Court is exhausted by the first appeal.[21]

To Check the Trend Away From the Enforcement of Contracts at a Proper Point

We are now suffering from a season of instability in our legal and economic systems. This instability may be necessary in order to allow constructive reforms, but our economic life is dependent upon the enforcement of contracts and if the trend away from such enforcement is carried too far, it will result in a confusion from which only the unscrupulous will reap any gain. In this case it has

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[19] To the same effect: *McCarthy* v. *Wynne* (10th Cir., 1942) 126 F. (2d) 620; *Rivett Lumber Co.* v. *Linder* 217 N. W. 946, 116 Nev. 463.

[20] In this case the issues of impossibility of performance and damages were before the Court of Appeals in the first appeal.

[21] This happens in two ways: The District Court renders a decision on the undecided issues unfavorable to the party and he lacks sufficient resources to appeal, or the District Court's decision is favorable, the other side appeals and the party lacks sufficient resources to contest the appeal.

been carried too far. The majority opinion in effect holds that a party who contracts to sell something can avoid that contract if one of the provisions is to deliver something else that the seller cannot deliver,[22] even though the seller has represented in the contract by conduct and orally that she has it;[23] which is in conflict with the previous cases to the effect that a person who knows of an impossibility unknown to the other party when he makes a contract cannot urge that impossibility as a defense.[24] Many contracts are made for future delivery of property which is not owned by the seller. Under this precedent, lack of ownership on delivery date excuses the seller; and a defect in title excuses the seller. How easy it is to avoid obligations under this precedent. All that a sharp seller has to do is to include in his contract one clause whereby he agrees to deliver any paper or article he does not own and he can feel free to accept, as this seller did, any better offer that comes in before he actually delivers the property he agreed to sell. And if in turn he includes in the new contract another such clause, he can do the same thing again and again. Also, under the erroneous ruling that Mrs. Hoffman's representations to Miss Manning, con-

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[22] This is the effect of the decision as precedent, although actually the record indicates that Mrs. Hoffman had the permit and there is no competent evidence of impossibility.

[23] We submit that defendant was estopped to plead her own wrong:—*Deitrick* v. *Greaney*, 309 U. S. 190, 84 L. ed. 694, reh. den. 309 U. S. 697, 84 L. ed. 1036; *Jovan* v. *Divoll*, 154 U. S. 657, 38 L. ed. 1092; *Ins. Co.* v. *Mowry*, 96 U. S. 544, 24 L. ed. 674; *Southern Ice Co.* v. *Morris* (5th Cir., 1915) 219 F. 551; *Jones Store* v. *Dean*, 56 F. (2d) 110, cer. den. 286 U. S. 559, 76 L. ed. 1292; *Dustin Grain Co.* v. *McAllister*, 296 Fed. 611; *Lambour* v. *Cleveland Trust Co.*, 29 F. (2d) 46; *Machovec* v. *Shipley*, 189 A. 223, 117 Md. 339.

[24] *Paine* v. *Parkhurst* (6th Cir., 1913) 205 F. 740, 744; *Stem* v. *Ace Wrecking Co.* (D. C. Mun. Ct. of App., 1944), 38 A. (2d) 626, 627; *Embry* v. *Lewis* (Tex. Civ. App.) 19 S. W. (2d) 87; *Ludlow* v. *Free*, 55 N. E. (2d) 318, 222 Ind. 568; see 6 Williston, Rev. Ed., sec. 1959, p. 5495, et seq.

veyed to and acted upon by Mrs. Partridge, were inadmissible because they were not made direct to her,[25] such a seller can feel perfectly free to tell anyone who will convey this information to a prospective purchaser that he does own the paper or article and still avoid his contract for lack of such ownership.

This case provides still another method whereby an unscrupulous seller can avoid his contract to his own profit, with the sanction of the Courts. Where his first contract is for payment on terms, he can sell the property to another for all cash and defend or limit his damages on the grounds that the second sale price conclusively fixes the value of the property.

In the matter of damages, there was conflicting evidence and the Court of Appeals erred in upsetting the District Judge (who had photographs and floor plans of the property, a personal appraisal of the expert witnesses, and was dealing with the question of value,[26]) and in holding, in effect, that the auction sale and the sale to the new purchaser were controlling evidence on this question.[27]

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[25] These were not only admissible as representations to be conveyed to Mrs. Partridge, but as admissions by a party (this was uncontradicted evidence that she had the permit). IV Wigmore, 3rd edition, sec. 1048; *Milton* v. *United States*, 71 App. D. C. 394, 398, 110 F. (2d) 556, 560.

[26] Valuation of real property is an issue particularly for the trial court:—*United States* v. *Lambert*, 146 F. (2d) 469, 471; *United States* v. *Thompson*, 146 F. (2d) 473, 475, in which the Court said, in refusing to upset the trial court's valuation of real estate: "* * *; we did not see the experts, on whose appearance so much depends in an issue like this."

[27] Sales under compulsion such as auction sales under deeds of trust or execution do not reflect the fair market value and are inadmissible in evidence: *Spear* v. *City of Bath*, 130 A. 507, 125 Me. 27, 30; *Park* v. *Compton* (CCA 5) 55 F. (2d) 80, 82; *Kansas City, etc. Co.* v. *Haake*, 331 Mo. 429, 438, 53 S. W. (2d) 891, 84 A. L. R. 1477; *West Skokie Drainage Dist.* v. *Dawson*, 243 Ill. 175, 181, 90

Furthermore, the majority opinion in the instant case is in conflict, in principle, on this question with the opinion of the Court of Appeals for the Third Circuit in *U. S.* v. *Certain Parcels of Land,* 144 F. (2d) 626, holding that sales are not conclusive evidence of value; and conflicts in fact and in principle on the whole damage question with the opinion of the Court of Appeals for the Tenth Circuit in *Korth, Collector of Internal Revenue* v. *Zion Trust Co.,* 148 F. (2d) 170, holding that in similar circumstances, such a finding as Judge Maguire's here is not clearly erroneous, due regard being had for the opportunity for the trial court to observe the witnesses, appraise their qualifications, and determine the weight to be given to their testimony; and is therefore binding on the appellate court.

N. E. 377; *Naftzger, et al.* v. *State,* 24 Ohio App. 183, 156 N. E. 614; and see: Treasury Estate Tax Regulations 105, sec. 81.10 (a). The Court of Appeals has held that sales to a condemnor are not admissible unless it is established as a preliminary fact that the purchase was without compulsion. *Hannan* v. *United States,* 76 U. S. App. D. C. 118, 131 F. (2d) 441; and authority cited therein, e. g., I Wigmore (3d ed. 1940) sec. 18E, p. 347, indicates that this rule extends generally to all offerings of sales as evidence of value. Consequently, we submit that the auction sale, and the second sale for $34,000.00 cash, were inadmissible to show value because there was no showing here of lack of compulsion. Furthermore, the concurrent sale for $34,000.00 was made May 21, 1946, and this and other evidence tendered supports the position that it was a forced sale to avoid a suit for specific performance (R 87, 88). Moreover, the undisputed evidence showed that the condition of the property had changed materially between the time of the auction sale and the time of the sale to purchaser (Compare R 81 with R 28, 71, 72). Also the measure of damages here was the difference between the value as a two-family dwelling and the purchase price: *Pendergast* v. *Reed,* 29 Md. 398, 96 Am. Dec. 539; and see: *Pa., etc., Ins. Co.* v. *Nussenger* (Md., 1943) 29 A. (2d) 653.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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